

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FEDERAL TRADE COMMISSION,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 WEBVALLEY, INC.,)
 a Minnesota Corporation,)
)
 PROFILE NATIONAL BUSINESS DIRECTORY, INC.,) Civil Action No.
 a Minnesota Corporation,)
)
 NATIONAL BUSINESS DIRECTORY, INC.,)
 a Minnesota Corporation,)
)
 PROTEL ADVANTAGE, INC.,)
 a Minnesota Corporation,)
)
 U.S. PROTEL, INC.,)
 a Minnesota Corporation,)
)
 SATYA P. GARG,)
 individually and as an officer of)
 WebValley, Inc., Profile National)
 Business Directory, and National)
 Business Directory, Inc.,)
)
 BLAINE C. CHRISTOFFERSON,)
 individually and as an officer of)
 U.S. Protel, Inc., and)
)
 SCOTT D. LEE,)
 individually and as an officer of)
 Protel Advantage, Inc.,)
)
)
 Defendants.)
)

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AN
EX PARTE TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE RELIEF,
AND ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED**

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I. INTRODUCTION

This case involves fraud in the "sale" of Internet web pages to small businesses across the United States. Defendants have billed thousands of consumers, on their telephone bills, in excess of \$9 million for services that they never ordered.

The scheme itself is simple. Defendants cold call consumers and offer to design web pages for them to be posted on the Internet. Defendants mention a "no obligation," free, 30-day trial period. They promise to send mock-ups of their web pages in the mail. Significantly, defendants fail to mention cost or billing practices. At most, consumers agree to receive more information. They have no idea, however, that they will automatically be assessed charges on their phone bills.

Defendants then sometimes (but not always) send prototypes of basic web pages that they have designed in India. Accompanying printed materials do not clearly explain what, if anything, consumers need to do, and do not explain how consumers would be expected to pay for this service if they wanted it. Consumers never receive a bill or invoice from defendants.

Consequently, the vast majority of consumers do not know that they must contact the defendants within thirty days to cancel or the defendants will begin charging them \$24.95 per month on their telephone bills. In many cases it is several months before consumers notice the charges and complain.

Defendants themselves estimate that they have "sold" more than 50,000 web pages.

The evidence submitted by the Federal Trade Commission ("Commission" or "FTC"), including the sworn statements of numerous consumers and three former employees, demonstrates that this is a carefully-constructed scam of large proportion. The FTC reviewed more than 900 consumer complaints. We also conducted a random survey of ninety-one businesses and organizations that had web pages hosted on defendants' web site.

An FTC investigator spoke with seventy of these businesses and organizations, the majority from Minnesota. Fifty-two, or 74%, of them had no idea that they had web pages on the Internet. Only twenty of those surveyed recall agreeing to the free 30-day trial period, but a majority of these twenty did not understand that they had to cancel the services in order to avoid being charged on their telephone bills. Of all the businesses and organizations surveyed, only two reported that they were "satisfied" or "pleased" with their web pages.

Likely hoping to capitalize on the popularity of Internet stocks, defendants currently await approval to sell \$34.5 million of stock through an initial public offering ("IPO"). Indeed, just prior to registering their IPO with the Securities and

Exchange Commission ("SEC")¹, defendants tried to sell the web pages without free trial periods. As a result, sales in one of their boiler rooms (there are as many as five in two states) dropped from approximately 200 per day to about 13. Within weeks, defendants resumed their pattern of deception. The possibility of defendants misleading many more consumers through sales of stock underscores the need for this Court to enjoin defendants' deceptions.

We ask that the Court take immediate action to halt these fraudulent practices by issuing a Temporary Restraining Order ex parte that prohibits deceptive practices at issue. To ensure the possibility of effective final relief, we ask the Court to freeze defendants' assets so that funds can be maintained and returned to victims. We further move the Court to appoint a temporary receiver who will take control of this enterprise, preserve its records and assets, and ensure that further deception does not occur.²

¹ The Securities and Exchange Commission ("SEC") is aware of the investigation that led to the filing of this case. Approval of defendants' \$34.5 million stock offering remains pending.

² The Minnesota Attorney General's office is concurrently bringing a similar action against another Minnesota operation engaged in similar practices. Both this case and the State of Minnesota's case represent the second stage in a joint federal and state effort to halt the practice of unauthorized charges for Internet services. In the last two months, the Commission filed three cases against similar operations, located in other parts of the country, that target small businesses and nonprofit organizations with offers to design web pages and web sites.

II. STATEMENT OF FACTS

A. The Parties

1. Plaintiff

The Commission is an independent agency of the United States government created by the FTC Act, 15 U.S.C. § 41, et seq. The Commission is charged, inter alia, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

The Commission is authorized by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to initiate proceedings in federal district court to enjoin violations of the FTC Act, as well as to obtain consumer redress and to secure necessary equitable relief. 15 U.S.C. §§ 53(b).

2. Defendants

Defendants are a single enterprise organized as three corporations. Three individuals control these organizations, one of whom is the enterprise's dominant figure.

Defendant **WebValley, Inc.**, began its operations as **National Business Directory, Inc.** ("National"), in May 1996.³ National thereafter changed its name to **Profile National Business**

³ Plaintiff's Exhibit (hereinafter "**PX**") 19, p. 444 [Daniels (FTC Investigator) Dec., Appendix ("App.") F] in Declarations and Exhibits in Support of Plaintiff's Ex Parte Temporary Restraining Order and Other Equitable Relief ("Declarations and Exhibits"). The page number reference following "**PX**" in this and other citations refers to the continuously-numbered pages in Volumes I and II of the Declarations and Exhibits.

Directory, Inc. ("Profile").⁴ Profile subsequently changed its name to WebValley.⁵ (Hereinafter, the term "WebValley" refers collectively to Profile, National, and WebValley.) WebValley's headquarters are in Hopkins, Minnesota. Its subsidiary, Software Moguls, Ltd., in New Delhi, India, produces web pages.⁶

Satya P. Garg has served as President and/or Chief Executive Officer of National, Profile, and WebValley.⁷ Mr. Garg lives in the District of Minnesota.

The headquarters of **Protel Advantage, Inc.** ("Protel"), are in Roseville, Minnesota.⁸

Scott D. Lee is Protel's President and Director.⁹ He lives in the District of Minnesota.

U.S. Protel, Inc. ("U.S. Protel"), has its headquarters in Roseville, Minnesota.¹⁰

Blaine C. Christofferson is U.S. Protel's Chief Executive

⁴ PX 19, pp. 446-48 [Daniels (FTC Investigator) Dec., App. F].

⁵ PX 19, p. 451 [Daniels (FTC Investigator) Dec., App. F].

⁶ PX 19, pp. 461-62 [Daniels (FTC Investigator) Dec., App. G].

⁷ PX 19, pp. 445-47, 451, 455-56, 463-69 [Daniels (FTC Investigator) Dec., Apps. F, G].

⁸ PX 19, pp. 473, 497 [Daniels (FTC Investigator) Dec., Apps. G, L].

⁹ PX 19, pp. 484, 491 [Daniels (FTC Investigator) Dec., Apps. H, J].

¹⁰ PX 19, p. 473 [Daniels (FTC Investigator) Dec., App. G].

Officer.¹¹ He lives in the District of Minnesota.

As a merged operation, U.S. Protel and Protel maintain four or five calling centers in Roseville, St. Cloud, and Duluth, Minnesota, as well as in New Richmond and Eau Claire, Wisconsin.¹² Together, the two corporations are known as "the Protel companies."¹³ In addition to telemarketing WebValley's Internet services, the "Protel companies" have marketed long distance service from at least two of the calling rooms.¹⁴

B. Defendants' Deceptive and Misleading Business Practices

1. Defendants' Scheme

Protel and U.S. Protel make unsolicited telephone calls on behalf of WebValley¹⁵, targeting small businesses and nonprofit

¹¹ **PX** 19, p. 474 [Daniels (FTC Investigator) Dec., App. G].

¹² **PX** 17, pp. 287-88 [Maiterth (Former Employee) Dec., ¶ 9].

¹³ **PX** 15, p. 129 [Andrie (Former Employee) Dec., ¶ 4].

¹⁴ Currently, Protel markets long distance telephone service out of its St. Paul office. **PX** 17, pp. 289-90 [Maiterth (Former Employee) Dec., ¶¶ 18-19]. In addition, Protel's offices in Eau Claire, Wisconsin, were raided by the Wisconsin Department of Agriculture, Trade, and Consumer Protection, pursuant to a search warrant, in February 1997. The basis for the search warrant was information that Protel was engaged in slamming - the unauthorized switching of long-distance telephone service. **PX** 14, p. 119 [Krueger (Wisconsin Consumer Protection Investigator) Dec., ¶¶ 2-4].

¹⁵ **PX** 20, p. 498 [McNerney (Consumer) Dec., ¶ 3]; **PX** 5, p. 33 [Haining (Consumer) Dec., ¶ 3]; **PX** 12, p. 86 [Schoen (Consumer) Dec., ¶ 3].

organizations throughout the United States.¹⁶ Speaking quickly throughout the pitch¹⁷, defendants describe the benefits of advertising on the Internet and propose to design prototype web pages customized for the businesses of every consumer they contact.¹⁸

To entice interest, defendants promise consumers a free, 30-day trial period.¹⁹ Defendants claim that they will produce web pages during this free period and post them on the Internet. Defendants emphasize that the trial period carries "no obligation" and "no risk" for consumers.²⁰ In other instances, defendants never mention a free, 30-day trial period and simply

¹⁶ E.g., **PX 3**, p. 20 [Bieda (Consumer) Dec., ¶1 (WA)]; **PX 4**, p. 30 [Davis (Consumer) Dec., ¶1 (IL)]; **PX 12**, p. 86 [Schoen (Consumer) Dec., ¶ 1 (NY)].

¹⁷ **PX 24**, p. 515 [Benham (Consumer) Dec., ¶ 9]; **PX 4**, p. 30 [Davis (Consumer) Dec., ¶ 4]; **PX 20**, p. 499 [McNerney (Consumer) Dec. ¶ 8]; **PX 25**, p. 518 [L. Oldham (Consumer) Dec., ¶ 9].

¹⁸ **PX 24**, p. 514 [Benham (Consumer) Dec., ¶ 2]; **PX 3**, p. 20 [Bieda (Consumer) Dec., ¶ 3]; **PX 4**, p. 30 [Davis (Consumer) Dec., ¶ 3]; **PX 6**, p. 35 [Hanson (Consumer) Dec., ¶ 3]; **PX 20**, p. 498 [McNerney (Consumer) Dec. ¶ 3]; **PX 25**, p. 517 [L. Oldham (Consumer) Dec., ¶ 2]; **PX 5**, p. 33 [Haining (Consumer) Dec., ¶ 3].

¹⁹ **PX 2**, p. 5 [Athay (Consumer) Dec., ¶ 2]; **PX 20**, pp. 498-99 [McNerney (Consumer) Dec. ¶ 5]; **PX 12**, p. 86 [Schoen (Consumer) Dec., ¶ 3]; **PX 11**, p. 81 [Ruder (Consumer) Dec., ¶ 2].

²⁰ **PX 2**, pp. 5-6 [Athay (Consumer) Dec., ¶ 4]; **PX 20**, pp. 498-99 [McNerney (Consumer) Dec. ¶ 5]; **PX 5**, p. 33 [Haining (Consumer) Dec., ¶ 3]; **PX 12**, p. 86 [Schoen (Consumer) Dec., ¶ 5]; **PX 11**, p. 81 [Ruder (Consumer) Dec., ¶ 2].

offer to send consumers information.²¹ In both scenarios, defendants promise to send packages to consumers within about a week, ostensibly so that consumers can decide whether to use defendants' services. These packages purportedly will contain information about WebValley as well as color models of the customized web pages.²² In some instances, defendants even tell consumers that they will contact them in a few weeks to see if consumers wish to purchase the web-page service.²³

Consumers do not believe that they are being asked to buy defendants' services.²⁴ Defendants do not mention the cost of their services.²⁵ They do not disclose their billing policies or practices.²⁶ Defendants never mention a cancellation policy.²⁷

²¹ **PX** 24, p. 515 [Benham (Consumer) Dec., ¶ 7]; **PX** 4, p. 31 [Davis (Consumer) Dec., ¶ 8]; **PX** 25, p. 517 [L. Oldham (Consumer) Dec., ¶ 2].

²² **PX** 4, p. 30 [Davis (Consumer) Dec., ¶ 4]; **PX** 20, pp. 498-99 [McNerney (Consumer) Dec. ¶ 5]; **PX** 25, p. 517 [L. Oldham (Consumer) Dec., ¶ 3]; **PX** 5, p. 33; **PX** 5, p. 33 [Haining (Consumer) Dec., ¶ 3]; **PX** 12, p. 87 [Schoen (Consumer) Dec., ¶ 8].

²³ **PX** 2, p. 7 [Athay (Consumer) Dec., ¶ 12].

²⁴ **PX** 20, p. 499 [McNerney (Consumer) Dec. ¶ 9]; **PX** 25, p. 517 [L. Oldham (Consumer) Dec., ¶ 8]; **PX** 5, p. 33 [Haining (Consumer) Dec., ¶ 3]; **PX** 12, p. 87 [Schoen (Consumer) Dec., ¶ 7]; **PX** 11, p. 81 [Ruder (Consumer) Dec., ¶ 3].

²⁵ **PX** 24, p. 514 [Benham (Consumer) Dec., ¶ 5]; **PX** 3, p. 21 [Bieda (Consumer) Dec., ¶ 6]; **PX** 4, p. 31 [Davis (Consumer) Dec., ¶ 8]; **PX** 25, p. 517 [L. Oldham (Consumer) Dec., ¶ 4]; **PX** 5, p. 33 [Haining (Consumer) Dec., ¶ 3].

²⁶ **PX** 2, p. 6 [Athay (Consumer) Dec., ¶ 6]; **PX** 24, p. 515 [Benham (Consumer) Dec., ¶ 5]; **PX** 3, p. 21 [Bieda (Consumer) Dec., ¶ 6]; **PX**

Defendants instruct their representatives to be intentionally vague and not to give consumers too much information during solicitation calls.²⁸ If consumers ask questions, the marketers are required to tell them that all of the information they need is included in the introductory packages they will receive shortly.²⁹ Defendants specifically instruct their sellers not to tell consumers, unless directly asked, that consumers are required to call and cancel defendants' services to avoid being automatically billed after thirty days.³⁰ Although defendants provide their telemarketers with written scripts, defendants' common practice is to encourage telemarketers to improvise or write their own. In fact, most do.³¹ To facilitate sales, telemarketers are free to tell

4, p. 31 [Davis (Consumer) Dec., ¶ 8]; **PX** 25, p. 517 [L. Oldham (Consumer) Dec., ¶ 4]; **PX** 12, p. 87 [Schoen (Consumer) Dec., ¶ 6 (impression that bill would be sent through mail)].

²⁷ **PX** 24, p. 514-15 [Benham (Consumer) Dec., ¶ 6]; **PX** 4, p. 31 [Davis (Consumer) Dec., ¶ 9]; **PX** 25, p. 517 [L. Oldham (Consumer) Dec., ¶ 5].

²⁸ **PX** 13, pp. 104-105 [Cramer (Former Employee) Dec., ¶¶ 22-23]; **PX** 17, pp. 293, 295, 300-01 [Maiterth (Former Employee) Dec., ¶¶ 35, 42, 64-68].

²⁹ **PX** 13, p. 104 [Cramer (Former Employee) Dec., ¶ 22]; **PX** 17, p. 293, [Maiterth (Former Employee) Dec., ¶ 35].

³⁰ **PX** 17, pp. 294-95 [Maiterth (Former Employee) Dec., ¶¶ 39-40, 44]; **PX** 13, p. 107 [Cramer (Former Employee) Dec., ¶ 35].

³¹ **PX** 17, p. 294 [Maiterth (Former Employee) Dec., ¶ 38]; **PX** 13, pp. 105-106 [Cramer (Former Employee) Dec., ¶¶ 29-32]. Information such as defendants' intention to charge consumers' phone bills and

consumers whatever they please.

Some consumers accept the free, 30-day trial period.³² Others consent only to receive information packages.³³ In either case, consumers believe that they will have no further dealings with defendants unless they so choose.³⁴ They are mistaken.

Instead, defendants charge consumers an automatically recurring monthly service fee unless consumers cancel defendants' services - services they never ordered in the first place.³⁵ In many cases, defendants bill consumers even when the consumers tell them that they do not want to purchase anything,³⁶ when consumers decline the offer to receive materials or the free

how to contact defendants to cancel is omitted from scripts defendants used. **PX** 17, p. 317 [Maiterth (Former Employee) Ex B].

³² **PX** 2, pp. 5-6 [Athay (Consumer) Dec., ¶ 4]; **PX** 20, p. 500 [McNerney (Consumer) Dec. ¶ 11].

³³ **PX** 24, p. 515 [Benham (Consumer) Dec., ¶ 8]; **PX** 3, pp. 20-1 [Bieda (Consumer) Dec., ¶ 5]; **PX** 25, p. 518 [L. Oldham (Consumer) Dec., ¶ 7]; **PX** 12, p. 87 [Schoen (Consumer) Dec., ¶ 8].

³⁴ **PX** 2, p. 7 [Athay (Consumer) Dec., ¶ 12]; **PX** 3, p. 23 [Bieda (Consumer) Dec., ¶ 14]; **PX** 20, p. 499 [McNerney (Consumer) Dec. ¶ 6]; **PX** 12, p. 88 [Schoen (Consumer) Dec., ¶ 12].

³⁵ E.g., **PX** 2, p. 6 [Athay (Consumer) Dec., ¶ 6].

³⁶ **PX** 2, pp. 5-6 [Athay (Consumer) Dec., ¶ 4]; **PX** 3, pp. 20-21 [Bieda (Consumer) Dec., ¶¶ 3, 5, 7-8 (consumer told telemarketer four times that she was not interested in buying anything)]; **PX** 4, p. 31 [Davis (Consumer) Dec., ¶ 10]; **PX** 6, pp. 35-36 [Hanson (Consumer) Dec., ¶¶ 3, 5 (twice declined to purchase)]; **PX** 25, p. 518 [L. Oldham (Consumer) Dec., ¶ 7]; **PX** 12, p. 86 [Schoen (Consumer) Dec., ¶ 4 (consumer emphasized that Red Cross could not purchase advertising)].

trial period,³⁷ and when defendants fail to contact consumers as promised.³⁸

Defendants attempt to legitimize their practices by “verifying” their calls with consumers. Using either live verifiers or an automated system, defendants lead consumers through a scripted or prerecorded verification.³⁹ Consumers are asked the following questions:

For clerical purposes I will be recording and verifying your business information, OK?

Your business name is _____

What is the correct business address _____

What is your main business phone number _____

And you are the authorized decision-maker for your company, correct?⁴⁰

Sometimes, verifiers also ask for information such as birth dates and ages. These are the only questions asked of consumers. Verifiers then tell consumers that they will receive an introductory package of materials and a copy of their web pages in the mail.⁴¹ At the end of the verification, verifiers are

³⁷ **PX** 6, pp. 35-36 [Hanson (Consumer) Dec., ¶¶ 3, 5]; **PX** 5, p. 33 [Haining (Consumer) Dec., ¶ 5].

³⁸ E.g., **PX** 19, pp. 386-87 [Daniels (FTC Investigator) Dec., ¶ 89].

³⁹ **PX** 17, pp. 301-05 [Maiterth (Former Employee) Dec., ¶¶ 69-89].

⁴⁰ **PX** 17, p. 318 [Maiterth (Former Employee) Dec., App. C].

⁴¹ **PX** 24, p. 515 [Benham (Consumer) Dec., ¶ 10]; **PX** 3, p. 20-21 [Bieda (Consumer) Dec., ¶ 5]; **PX** 20, p. 500 [McNerney (Consumer) Dec. ¶ 12]; L. Oldham ¶ 10; **PX** 12, p. 87 [Schoen (Consumer) Dec., ¶ 9].

supposed to recite the following:

Remember, set-up and your first 30 days are a trial period. At the end of your trial period you will be billed only \$19.95 a month, charged on your local telephone bill for your convenience. You are under no obligation and may cancel at any time, so if you have any questions or concerns please contact our customer service by calling the toll-free number included in your packet.⁴²

The verifiers do not ask consumers whether they understand the terms of the offers or if they accept them. Defendants' verification script, to the extent it is followed, does not verify that consumers agree to be billed after the trial period.

The last minute disclosures about billing are often obfuscated by fast-talking verifiers, verifiers who consistently depart from the scripts, and telemarketers who talk over the disclosures.⁴³ One former employee reports that even if consumers hung up during the verification process, the sales would still be considered "verified."⁴⁴ According to a former employee who monitored the verifications, most consumers do not understand that they will be billed if they take no action.⁴⁵ Defendants' verification scripts were clearly not drafted to avoid consumer confusion.

⁴² **PX** 17, p. 318 [Maiterth (Former Employee) Dec., App. C].

⁴³ **PX** 17, pp. 301-05 [Maiterth (Former Employee) Dec., ¶¶ 69-89].

⁴⁴ **PX** 13, p. 110 [Cramer (Former Employee) Dec., ¶ 48].

⁴⁵ **PX** 17, p. 305 [Maiterth (Former Employee) Dec., ¶ 89].

The deception initiated in defendants' sales pitches is furthered by the introductory packages sent to some consumers.⁴⁶ These materials say nothing about billing practices or the cost of the services.⁴⁷ In addition, they do not disclose that consumers will be charged on their telephone bills after the expiration of the free, 30-day trial period unless consumers cancel defendants' service.⁴⁸ Of course, when the promised materials never arrive, consumers have no telephone number for contacting defendants. The fact that defendants never send invoices or bills compounds consumers' confusion.

2. Third-Party Billing Aggregators and Refunds

Defendants use third-party billing aggregators to place

⁴⁶ Many consumers never even receive the introductory materials that defendants claim will arrive in "5 to 7 business days." **PX 7**, p. 52 [Ellis (Consumer) Dec., ¶ 15]; **PX 6**, p. 39 [Hanson (Consumer) Dec., ¶ 20]; **PX 25**, p. 518 [L. Oldham (Consumer) Dec., ¶ 11]; **PX 23**, p. 512 [M. Oldham (Consumer) Dec., ¶ 13]; **PX 5**, pp. 33-34 [Haining (Consumer) Dec., ¶ 6].

⁴⁷ **PX 2**, p. 7 [Athay (Consumer) Dec., ¶ 12]. Nothing in the welcome letter alerts people to defendants' intent to charge. The letter contains only a vague reference to billing and costs that is buried among extraneous information: "It's **inexpensive**. For around a dollar a day, you are connected to the world with total freedom to update at any time. You may be billed through your local telephone company (where available), on your credit card, or by automated bank debit." **PX 2**, p. 12 [Athay (Consumer) Dec., App. B (emphasis in original)]. This description of billing and cost is hardly sufficient. Defendants do not disclose that the service fee is \$24.95 a month, or that they always charge consumers through telephone bills. Moreover, the conditional statement "[y]ou may be billed" implies to a reasonable consumer that billing occurs, if at all, when consumers accept the service and authorize charging.

⁴⁸ **PX 12**, pp. 87-88 [Schoen (Consumer) Dec., ¶ 11].

charges on consumers' local telephone bills.⁴⁹ Consumers often do not notice the charges because they are too busy tending to their small businesses and organizations, or because they are not aware that third parties can make unauthorized charges to their telephone bills.⁵⁰

Consumers who notice defendants' unauthorized charges and seek refunds are often given the runaround. Because the third-party billing aggregators' names are usually identified on the telephone bills, consumers often call them first.⁵¹ In many instances, the billing aggregators claim that the consumers authorized the charges, and either refuse to give consumers refunds or issue only partial refunds.⁵² Most consumers are told to call or write WebValley. WebValley also takes the position

⁴⁹ A billing aggregator collects miscellaneous telephone charges from vendors such as defendants and processes them to local telephone companies. The telephone companies print the charges on consumers' home bills and collect payment.

Consumers' telephone bills usually identify the name of the third-party billing aggregator that placed the charges, and, in some cases, also identify National, Profile, or WebValley. E.g., **PX** 1, p. 1 [Gittelman (Consumer) Dec., ¶ 2]; **PX** 11, pp. 84-85 [Ruder (Consumer) Dec., App. A].

⁵⁰ **PX** 2, pp. 8-9 [Athay (Consumer) Dec., ¶ 19]; **PX** 7, pp. 49-50 [Ellis (Consumer) Dec., ¶ 4]; **PX** 6, pp. 36-37 [Hanson (Consumer) Dec., ¶ 10]; **PX** 8, pp. 58-59 [Moilanen (Consumer) Dec., ¶ 11]; **PX** 1, p. 1 [Gittelman (Consumer) Dec., ¶ 2].

⁵¹ E.g., **PX** 21, p. 502-503 [Huttenlock (Consumer) Dec., ¶ 4].

⁵² **PX** 9, p. 63 [Ratcliff (Consumer) Dec., ¶ 8]; **PX** 1, pp. 1-2 [Gittelman (Consumer) Dec., ¶ 5].

that complaining consumers have authorized the charges on their phone bills.⁵³ WebValley resists giving refunds after consumers complain,⁵⁴ and, in a number of instances, has ignored written complaints.⁵⁵

For instance, Dominic Ellis, a consumer from Des Moines, Iowa, contacted WebValley after he discovered unauthorized charges.⁵⁶ When Mr. Ellis called WebValley, a customer representative insisted that his business partner had authorized the charges. Mr. Ellis informed the representative that it was impossible because his partner was in the hospital receiving cancer treatments on the date of the alleged authorization. The representative then claimed that "Mick Ellis" had actually authorized the charges, not realizing that he was speaking with Mr. Ellis.⁵⁷

⁵³ **PX** 3, p. 24 [Bieda (Consumer) Dec., ¶ 19]; **PX** 7, p. 50 [Ellis (Consumer) Dec., ¶ 7]; **PX** 23, pp. 510, 512 [M. Oldham (Consumer) Dec., ¶¶ 7, 10]; **PX** 9, p. 64 [Ratcliff (Consumer) Dec., ¶ 11]. In many instances, employees who supposedly ordered defendants' services had no authority to make purchases. Sometimes no one at the entities targeted by defendants recalls receiving a telemarketing call from defendants. E.g., **PX** 9, p. 64 [Ratcliff (Consumer) Dec., ¶ 10]; **PX** 10, pp. 72-73 [Oates (Consumer) Dec., ¶¶ 4, 6].

⁵⁴ **PX** 11, p. 83 [Ruder (Consumer) Dec., ¶ 9].

⁵⁵ **PX** 12, p. 89 [Schoen (Consumer) Dec., ¶ 19]; **PX** 10, p. 73 [Oates (Consumer) Dec., ¶ 8]; **PX** 23, p. 513 [M. Oldham (Consumer) Dec., ¶ 17].

⁵⁶ **PX** 7, pp. 49-50 [Ellis (Consumer) Dec., ¶¶ 2-7].

⁵⁷ **PX** 7, p. 50 [Ellis (Consumer) Dec., ¶¶ 7-8].

Although some consumers eventually receive full credits, the refunds often come from the phone companies, not defendants.⁵⁸ Other consumers cancel the services but fail to obtain credits for past charges.⁵⁹ Some consumers receive only partial credits.⁶⁰ Even after canceling defendants' service, many consumers find that new charges continue to be added to their phone bills.⁶¹ Whatever the outcome, getting through to defendants, their billing aggregators, and the phone companies is difficult, making the process of obtaining refunds laborious.⁶²

3. Value of Defendants' Web Pages

Defendants' web pages are of questionable value. A web page has utility if it can be found on the Internet or if a business owner can promote the web page itself through other media. Yet, in this instance, the very consumers whose businesses are promoted on defendants' web site frequently do not know that

⁵⁸ **PX 2**, p. 8 [Athay (Consumer) Dec., ¶ 18]; **PX 3**, pp. 24-25 [Bieda (Consumer) Dec., ¶ 21]; **PX 11**, p. 83 [Ruder (Consumer) Dec., ¶ 10].

⁵⁹ **PX 3**, p. 24 [Bieda (Consumer) Dec., ¶ 18]; **PX 7**, pp. 50-52 [Ellis (Consumer) Dec., ¶¶ 9, 14].

⁶⁰ **PX 9**, p. 67 [Ratcliff (Consumer) Dec., ¶ 21].

⁶¹ **PX 7**, p. 51 [Ellis (Consumer) Dec., ¶ 10]; **PX 6**, pp. 37-38 [Hanson (Consumer) Dec., ¶ 14-15, 17]; **PX 8**, p. 58 [Moilanen (Consumer) Dec., ¶ 9]; **PX 9**, pp. 65 [Ratcliff (Consumer) Dec., ¶ 13]; **PX 12**, p. 89 [Schoen (Consumer) Dec., ¶ 18].

⁶² E.g., **PX 9**, p. 67 [Ratcliff (Consumer) Dec., ¶ 21]; **PX 23**, p. 513 [M. Oldham (Consumer) Dec., ¶ 16].

their web pages exist.⁶³ In fact, 74 percent of the organizations we contacted had no idea that defendants had created web pages for them.⁶⁴ Nevertheless, 63 percent of these entities had been charged by defendants.⁶⁵

In addition, these web pages cannot easily be found by potential customers using the Internet. Employing standard search terms on six major search engines, an FTC investigator could not locate the vast majority of web pages created by defendants.⁶⁶ These figures are particularly alarming since defendants represent that they will "register" consumers' web pages with the major search engines.⁶⁷

4. Defendants' Current Practices

Defendants briefly altered their practices this spring before returning to their deception. Two events likely precipitated these changes: WebValley's plan to go public on the NASDAQ exchange, and a pending lawsuit by the Illinois Attorney General.

⁶³ **PX** 19, p. 9 [Daniels (FTC Investigator) Dec., ¶ 9].

⁶⁴ Id.

⁶⁵ **PX** 19, p. 350 [Daniels (FTC Investigator) Dec., ¶ 11]. Some consumers try but are unable to locate their web pages. See **PX** 1, p. 3 [Gittelman (Consumer) Dec., ¶ 10].

⁶⁶ **PX** 19, pp. 354-55 [Daniels (FTC Investigator) Dec., ¶¶ 23-26].

⁶⁷ **PX** 2, p. 12 [Athay (Consumer) Dec., App. B]; **PX** 17, pp. 295-96 [Maiterth (Former Employee) Dec., ¶ 45].

On April 8, 1999, WebValley filed a registration statement with the SEC seeking to sell \$34.5 million of stock in an IPO. In its registration statement, the company asserts its (short-lived) rationale for seeking consumers' permission before billing them:

We understand that many of our clients are intimidated or unsure about establishing a Web site. To alleviate our clients' concerns, we previously offered free trial periods for our services. We recently discontinued this practice as part of our plan to reduce our client attrition rate and we now provide a site design review period and call back confirmation before the first billing cycle. We believe this new process is a low cost, low risk solution for our clients, comparable to the previously offered trial period.⁶⁸

Perhaps to satisfy the SEC and investors, defendants attempted to sell their Internet services honestly in late March and early April.⁶⁹ Sales plummeted. In the New Richmond office, for example, sales more than 90 percent.⁷⁰

A few weeks later, in April 1999, defendants decided to tell consumers that they would send them prototype web pages and some informational material to review. "Customer care representatives" would follow up shortly thereafter to see if

⁶⁸ **PX** 19, p. 475 [Daniels (FTC Investigator) Dec., App. G (emphasis added)].

⁶⁹ **PX** 17, pp. 308, 310-11 [Maiterth (Former Employee) Dec., ¶¶ 106, 113-18].

⁷⁰ **PX** 15, p. 131 [Andrie (Former Employee) Dec., ¶ 10]; **PX** 17, p. 311 [Maiterth (Former Employee) Dec., ¶¶ 119-20].

consumers wanted to purchase the service.⁷¹ Apparently, this offer was put into effect before defendants had an actual "customer care" team set up to handle these calls.⁷² Although defendants' sales increased slightly with this change, they apparently were not high enough. After only a few weeks, defendants changed their offer again.⁷³

On April 22, 1999, the Illinois Attorney General filed a consumer protection action accusing WebValley of deceptive acts and practices similar to those alleged here by the Commission. At about this same time, defendants began offering consumers a "fifteen-day review period," after which consumers would be billed if they did not call to cancel.⁷⁴

With this latest permutation, defendants essentially returned to the practice of deceiving consumers by billing them without authorization. Defendants once again allowed telemarketers to script their own pitches.⁷⁵ Ostensibly, telemarketers were supposed to tell consumers that they had to

⁷¹ **PX** 17, p. 311-13 [Maiterth (Former Employee) Dec., ¶¶ 121-25]; **PX** 15, p. 132 [Andrie (Former Employee) Dec., ¶ 13].

⁷² **PX** 15, pp. 132-33 [Andrie (Former Employee) Dec., ¶ 14].

⁷³ **PX** 15, p. 133 [Andrie (Former Employee) Dec., ¶¶ 16-17].

⁷⁴ **PX** 15, p. 134 [Andrie (Former Employee) Dec., ¶¶ 18-20].

⁷⁵ **PX** 15, p. 134 [Andrie (Former Employee) Dec., ¶ 19].

cancel the service within fifteen days to avoid being billed.⁷⁶ According to a former employee, however, management is aware that only about half of the telemarketers actually make this disclosure to consumers.⁷⁷ The same former employee reports that while verifications were also initially cleaned up in March 1999, the telemarketers quickly resumed coaching consumers' answers and talking over the relevant disclosures.⁷⁸

Viewed together, the multiple and short-lived changes in sales strategies and scripts, the shift back towards deceptive practices, and continued consumer complaints all suggest that defendants' sales tactics remain deceptive. Indeed, consumer Joe Briggs received a call from defendants in May 1999. He was offered a "free trial period" on a web site.⁷⁹ Mr. Briggs declined the offer, but to appease a persistent telemarketer agreed to accept an information package. Mr. Briggs specifically told the telemarketer that he did not want to purchase a web site because his company had just invested over \$1,000 in creating its own web site.⁸⁰ Costs or billing never entered their discussion.

⁷⁶ Id.

⁷⁷ **PX** 15, p. 134 [Andrie (Former Employee) Dec., ¶ 20].

⁷⁸ **PX** 15, p. 135 [Andrie (Former Employee) Dec., ¶¶ 23-24].

⁷⁹ **PX** 15, p. 137 [Andrie (Former Employee) App. A]; **PX** 21, p. 507 [Briggs (Consumer) Dec., ¶ 4].

⁸⁰ **PX** 21, p. 507 [Briggs (Consumer) Dec., ¶¶ 2-4].

While Mr. Briggs never received an information package, his company was billed \$24.95 by defendants.⁸¹

Despite the aforementioned changes, defendants never stopped making unauthorized charges to the telephone bills of people they previously deceived.⁸² Of the consumers we surveyed in May and June 1999, fourteen of them had been billed continuously for a period ranging from 5 to eighteen months.⁸³

III. THIS COURT HAS AUTHORITY TO GRANT THE REQUESTED RELIEF

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides that "in proper cases the Commission may seek, and after proper proof the court may issue, a permanent injunction." Section 13(b) authorizes the Commission to seek injunctive relief against violations of "any provision of law enforced by [it]." A case of deceptive practices such as this one, involving misrepresentations of material facts in violation of Section 5, is a "proper case." FTC v. World Travel Vacation Brokers, Inc.,

⁸¹ **PX** 21, p. 508 [Briggs (Consumer) Dec., ¶¶ 8, 9]; **PX** 21, p. 502 [Huttenlock (Consumer) Dec., ¶ 2].

⁸² For example, defendants added more than \$350 in authorized charges to the local telephone bill of the Whidbey Evangelical Free Church. **PX** 9, pp. 62-63 [Ratcliff (Consumer) Dec., ¶ 5]. See also **PX** 2, pp. 3, 4 [Athay (Consumer) Dec., ¶¶ 13, 15, 17]; **PX** 4, pp. 30-31 [Davis (Consumer) Dec., ¶ 6]; **PX** 7, p. 49 [Ellis (Consumer) Dec., ¶ 2]; **PX** 6, p. 36 [Hanson (Consumer) Dec., ¶ 7]; **PX** 3, pp. 23-24 [Bieda (Consumer) Dec., ¶¶ 16-17]; **PX** 8, p. 57 [Moilanen (Consumer) Dec., ¶ 3]; **PX** 23, p. 510 [M. Oldham (Consumer) Dec., ¶ 4]; **PX** 12, p. 88 [Schoen (Consumer) Dec., ¶ 13]; **PX** 1, p. 1 [Gittelman (Consumer) Dec., ¶ 2].

⁸³ **PX** 19, p. 353 [Daniels (FTC Investigator) Dec., ¶ 21].

861 F.2d 1020, 1028 (7th Cir. 1988); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1291 (D. Minn. 1985).

Once the Commission invokes the equitable power of the federal courts, the full breadth of this Court's authority is available, including the power to grant ancillary final relief such as rescission of contracts and restitution. See, e.g., FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314-15 (8th Cir. 1991); FTC v. Amy Travel, 875 F.2d 564, 571-72 (7th Cir.), cert. denied, 493 U.S. 954 (1989). Further, the Court may grant a preliminary injunction, a temporary restraining order, and whatever additional preliminary relief is necessary to preserve the possibility of effective final relief. Security Rare Coin, 931 F.2d at 1314-15; World Travel, 861 F.2d at 1026. Such relief may include an order freezing assets, appointing a temporary receiver, permitting expedited discovery, and authorizing immediate access to records. See generally Security Rare Coin, 931 F.2d at 1314-15 ("Section 13(b) does not limit the full exercise of the district court's inherent equitable power."); World Travel, 861 F.2d at 1031 (freeze of corporate and personal assets and compulsory production of defendants' financial records); FTC v. H. N. Singer, Inc., 668 F.2d 1107, 1112-14 (9th Cir. 1982) (asset freeze and accounting); FTC v. Equifin Int'l, Inc., No. CV 97-4526-DT, 1997 U.S. Dist. LEXIS 10288, *32 (C.D. Cal. July 3, 1997) (ordering, inter alia, an

asset freeze, appointment of a receiver, production of financial records, access to business premises, and expedited discovery).

A. The Commission Meets the Applicable Legal Standard for the Issuance of a Temporary Restraining Order and Preliminary Injunction

In order to grant preliminary injunctive relief in a case under the FTC Act, the Court must determine the Commission's likelihood of ultimate success, and balance the equities. See World Travel, 861 F.2d at 1029. When considering the public and private equities, the Court should give the public interest much greater weight. Id. Preliminary injunctive relief is therefore proper if the Commission shows that there is a probable chance of success on the merits and that the balance of the equities - with a "far greater" emphasis on the public interest - favors the grant of injunctive relief.⁸⁴ Id.

1. The Evidence of Defendants' Violations of Section 5 of the FTC Act Demonstrates the Commission's Likelihood of Success on the Merits

The evidence submitted by the Commission establishes a strong likelihood of ultimate success on the merits. The evidence shows that defendants are engaged in a widespread, lucrative scheme to defraud the public by making unauthorized charges to consumers' telephone bills. Misrepresenting material facts to induce the purchase of goods or services is a deceptive

⁸⁴ No security is required of any agency of the United States for issuance of a restraining order. FED.R.CIV.P. 65(c). The Commission therefore need not post bond.

practice that violates Section 5. See, e.g., Kitco, 612 F. Supp. at 1291. Specifically, shipping and billing for unordered merchandise violates Section 5. FTC v. Goldberg, 40 F.T.C. 296, 300-01 (1945).

To establish a violation of Section 5, the Commission must show (a) that there was a misrepresentation or omission of a kind usually relied upon by reasonable and prudent persons; (b) that the misrepresentations or omissions were widely disseminated; and (c) that the injured consumers purchased defendants' products. Security Rare Coin, 931 F.2d at 1316; Kitco, 612 F. Supp. at 1293. If the Commission makes this showing, the burden shifts to defendants to prove that consumers did not rely upon the misrepresentations. Kitco, 612 F. Supp. at 1293. Here, the Commission has made the required showing.

a. A Reasonable and Prudent Person Would Rely Upon Defendants' Misrepresentations and Omissions

Given the nature and extent of defendants' misrepresentations and omissions of material fact, reasonable and prudent consumers naturally relied upon defendants' sales pitches and materials.

This Court may examine the sales techniques at issue to reach its own conclusions about a reasonable consumer's interpretation of defendants' representations. See FTC v. U.S. Sales Corp., 785 F. Supp. 737, 745 (N.D. Ill. 1993). Defendants' tactic is to tell consumers that their trial offers of customized

web pages are "risk free" and "without obligation." They suggest that consumers will have the opportunity to review their materials and proposals. Defendants do not mention any aspect of their billing practices, including any discussion that charges will be added automatically to consumers' telephone bills unless consumers take the initiative to cancel defendants' services. Consumers reasonably believe that the trial period is a time for them to consider using defendants' services. Consumers also reasonably believe that if they take no further action their association with defendants will end.

Defendants' verification scripts, which contain limited disclosures about costs and billing, are ineffective and therefore legally insufficient. As with non-prominent or ambiguous fine-print disclaimers, ineffective disclosures do not overcome overt misrepresentations. Cf. Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1496-97 (1st Cir. 1989) ("Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression"); Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975). Defendants' "verifications" maintain and advance their deceptions. The verifiers talk quickly, and telemarketers speak over the automated verification

system so that consumers cannot hear the disclosures.⁸⁵ Most consumers do not understand that defendants will bill them on their telephone bills unless they take steps to cancel the service.⁸⁶

b. The Defendants' Misrepresentations and Omissions Are Widely Disseminated

Defendants' representations are widely disseminated. The Commission submits with this Memorandum the declarations of 20 consumers from 11 states.⁸⁷ These consumers represent but a few of the individuals throughout the country who have fallen victim to defendants' scheme. Declarations from two former employees of U.S. Protel confirm that defendants made at least 200 sales a day to consumers throughout the United States.⁸⁸ Defendants

⁸⁵ **PX** 13, p. 111 [Cramer (Former Employee) Dec., ¶ 52]; **PX** 15, p. 135 [Andrie (Former Employee) Dec., ¶¶ 23-24]; **PX** 17, pp. 303, 304 [Maiterth (Former Employee) Dec., ¶¶ 78, 85].

⁸⁶ **PX** 17, p. 305 [Maiterth (Former Employee) Dec., ¶ 89]; **PX** 13, p. 111 [Cramer (Former Employee) Dec., ¶ 53].

⁸⁷ Those states are AZ, IA, ID, IL, NY, OH, OR, PA, SD, UT, and WA. In addition, an FTC investigator spoke to more than 50 consumers from Minnesota. **PX** 19, pp. 363-404 [Daniels (FTC Investigator) Dec., ¶¶ 49-119]. The investigator also reviewed in excess of 900 complaints lodged with the FTC and other law enforcement agencies, billing aggregators, and Better Business Bureaus. **PX** 19, pp. 358-62 [Daniels (FTC Investigator) Dec., ¶¶ 35-48].

⁸⁸ Defendants' New Richmond call center averages two hundred sales each day. **PX** 17, pp. 291-92 [Maiterth (Former Employee) Dec., ¶ 29]; **PX** 15, p. 131 [Andrie (Former Employee) Dec., ¶ 10]. Defendants, however, operate out of five separate call centers, so the average daily sales for the entire operation are probably significantly higher. See **PX** 17, pp. 287-88 [Maiterth (Former Employee) Dec., ¶ 9]; **PX** 19, p. 477 [Daniels (FTC Investigator) Dec., App. G].

themselves claim that they host as many as 54,000 web pages for consumers.⁸⁹ They also claim to "have had significant success in attracting a diversified client base across the entire United States."⁹⁰

c. Injured Consumers Are Charged for Defendants' Services

The Commission's evidence shows that defendants charged consumers across the country at least \$19.95 without authorization. Many consumers were charged for multiple months, in some cases more than \$400.⁹¹ Defendants admit that their net sales on web pages exceed \$9 million since 1996.⁹² Considering that few if any consumers actually agree to purchase defendants' services,⁹³ thousands of consumers were charged and paid for services that they did not authorize.

2. The Public Interest Requires the Issuance of Provisional Relief

Immediate injunctive relief is necessary to protect the public from further financial harm. Defendants have defrauded consumers continuously since at least 1996. The evidence shows

⁸⁹ **PX** 16, p. 139 [Krause (FTC Investigator) Dec., ¶ 4].

⁹⁰ **PX** 19, pp. 478-79 [Daniels (FTC Investigator) Dec., App. G].

⁹¹ **PX** 19, p. 353 [Daniels (FTC Investigator) Dec., ¶ 21].

⁹² **PX** 19, p. 468(a) [Daniels (FTC Investigator) Dec., App. G].

⁹³ **PX** 19, pp. 352-53 [Daniels (FTC Investigator) Dec., ¶¶ 18-20].

that they continue to collect unauthorized fees from consumers.⁹⁴ The vast majority - **91.4%** - of the consumers interviewed in the Commission's survey apparently were unaware of the automatic consequences of accepting defendants' so-called free, "no obligation" offers.⁹⁵ Nearly **58%** of these consumers were already charged by defendants.⁹⁶ Of 70 organizations contacted by the FTC, only two indicated satisfaction with defendants' services.⁹⁷ Nearly three-quarters of those surveyed had no idea they even had a web site.⁹⁸

The evidence also shows that even though defendants tried to sell their web pages without deception for a few weeks in March 1999, they quickly returned to their misleading practices. (See Section II.B.4, infra.) Enjoining the inconsistent behavior of a defendant requires a showing of "some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." United States v. W.T. Grant Co., et al., 345 U.S. 629, 633 (1953). See also FTC v. Security Rare Coin & Bullion Corp., 1989-2 Trade Cas. (CCH)

⁹⁴ **PX** 19, p. 353 [Daniels (FTC Investigator) Dec., ¶ 21].

⁹⁵ **PX** 19, pp. 350-51 [Daniels (FTC Investigator) Dec., ¶ 13].

⁹⁶ Id.

⁹⁷ **PX** 19, p. 349 [Daniels (FTC Investigator) Dec., ¶ 10].

⁹⁸ **PX** 19, pp. 349, 350 [Daniels (FTC Investigator) Dec., ¶¶ 9, 11].

¶ 68,807, at 62,219-20 (D. Minn. 1989), aff'd., 931 F.2d 1312 (8th Cir. 1991); Kitco, 612 F. Supp. at 1296.

The Commission's evidence suggests more than "some cognizable danger of recurrent violation." The evidence shows continued, egregious violations that are highly likely to recur. As of May 1999, defendants were failing to disclose in about half of all sales calls that consumers will be billed month after month unless they take steps to cancel.⁹⁹ Such calls undoubtedly account for most of defendants' sales. Moreover, defendants have returned to their practice of encouraging telemarketers to deviate from their written scripts.¹⁰⁰ Even the Illinois Attorney General's case has not deterred them.

Furthermore, the public's interest in protecting consumers and securing relief for defendants' victims far outweighs any burden imposed on defendants by the proposed Temporary Restraining Order ("Proposed TRO"). The Proposed TRO and preliminary injunction are narrowly tailored to prohibit only unfair and deceptive conduct. Such prohibitions do not work any undue hardship on defendants. See Security Rare Coin & Bullion Corp., 1989-2 CCH ¶ 68,807, at 62,220. Defendants plainly have no right to persist in conduct that violates federal law. FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989)

⁹⁹ **PX** 15, p. 134 [Andrie (Former Employee) Dec., ¶ 20].

¹⁰⁰ **PX** 15, p. 134 [Andrie (Former Employee) Dec., ¶ 19].

(upholding district court's finding of "no oppressive hardship to the defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation, or preserve their assets from dissipation or concealment.").

B. Satya P. Garg, Blaine C. Christofferson, and Scott D. Lee are Personally Liable

Mr. Garg, Mr. Christofferson, and Mr. Lee are key figures in the operations of WebValley, Protel, and U.S. Protel. Because each individual is subject to injunctive provisions, each is also personally liable for violations of the FTC Act. To obtain the monetary equivalent of rescission from an individual defendant, the Commission must prove that the individual had knowledge that a corporation or one or more of its agents engaged in dishonest or fraudulent conduct. Kitco, 612 F. Supp. at 1292. Knowledge is demonstrated by actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth. Id. See also Amy Travel, 875 F.2d at 573.

Additionally, the Commission must show that the defendants directly participated in the acts or had the authority to control the conduct. "Authority to control the company is evidenced by active involvement with business matters and corporate policy including assumption of officer duties." Amy Travel, 875 F.2d at 573; Kitco, 612 F. Supp. at 1292.

1. Satya P. Garg

Mr. Garg has the authority to control WebValley and its agents, Protel and U.S. Protel. Additionally, Mr. Garg has knowledge of the corporate defendants' deceptive acts and practices.

Mr. Garg's control over all three corporate defendants derives from his role at WebValley, his ownership interests in all three, and the de facto conglomeration of WebValley, Protel, and U.S. Protel - a single enterprise with Mr. Garg at the helm. Mr. Garg has the ultimate authority at WebValley.¹⁰¹ He owns 88.9% of WebValley common stock.¹⁰² He has served as President of National, Profile, and WebValley.¹⁰³ He also holds the titles of Chairman of the Board and Chief Executive Officer of WebValley.¹⁰⁴

Mr. Garg exercises authority over Protel and U.S. Protel by virtue of the fact that the companies function as telemarketing subsidiaries of WebValley. Mr. Garg owns 25% of U.S. Protel and 7.5% of Protel.¹⁰⁵ WebValley is U.S. Protel's only client.¹⁰⁶

¹⁰¹ PX 17, pp. 288-89, 309-10 [Maiterth (Former Employee) Dec., ¶¶ 12, 14-15, 109-10, 112].

¹⁰² PX 19, p. 468(b) [Daniels (FTC Investigator) Dec., App. G].

¹⁰³ PX 19, pp. 445-47, 451, 455-56 [Daniels (FTC Investigator) Dec., App. F].

¹⁰⁴ PX 19, pp. 463-69 [Daniels (FTC Investigator) Dec., App. G].

¹⁰⁵ PX 19, pp. 470-71 [Daniels (FTC Investigator) Dec., App. G].

¹⁰⁶ PX 19, p. 480 [Daniels (FTC Investigator) Dec., App. G].

WebValley was Protel's principal client.¹⁰⁷ Along with Mr. Christofferson and Mr. Lee, Mr. Garg is carbon copied on internal memoranda distributed throughout U.S. Protel.¹⁰⁸ Mr. Christofferson, the Chief Executive of U.S. Protel, and Mr. Lee, the President of Protel, are said to "report" to Mr. Garg.¹⁰⁹ At a management meeting in Minnetonka, Minnesota, in early 1999, where employees of WebValley and U.S. Protel gathered, Mr. Garg was introduced as the "main man" and owner and president of "the company" - a reference to a single entity that no one questioned.¹¹⁰ Mr. Garg has also been called the financial backbone of "the company." Mr. Garg emphasized his role as the head of "the company" by assuring a manager of the Protel companies that she could telephone him directly should she have questions or concerns about corporate policies.¹¹¹ Protel and U.S. Protel employees understood that Mr. Garg was their boss.¹¹²

Besides control over the corporate entities, Mr. Garg has knowledge of their deceptive acts and practices. Many consumers

¹⁰⁷ **PX** 19, p. 481 [Daniels (FTC Investigator) Dec., App. G]; **PX** 13, p. 101 [Cramer (Former Employee) Dec. ¶ 7].

¹⁰⁸ **PX** 17, p. 316 [Maiterth (Former Employee) Dec., App. A].

¹⁰⁹ **PX** 17, p. 289 [Maiterth (Former Employee) Dec., ¶ 15].

¹¹⁰ **PX** 17, p. 309 [Maiterth (Former Employee) Dec., ¶ 109].

¹¹¹ **PX** 17, pp. 309-10 [Maiterth (Former Employee) Dec., ¶ 112].

¹¹² **PX** 17, p. 309 [Maiterth (Former Employee) Dec., ¶ 109].

challenging unauthorized charges complain directly to WebValley or to one of its billing aggregators. One such billing aggregator sent WebValley summaries of complaints from consumers on a regular basis. In a two-day period, 43 complaints logged by the billing aggregator were sent via facsimile to WebValley's headquarters.¹¹³ In addition, WebValley sent weekly reports of customer cancellation rates to Protel and U.S. Protel. WebValley knew that sales made by certain telemarketers resulted in cancellation rates as high as 70%.¹¹⁴ Given WebValley's awareness of the high rate of customers' dissatisfaction, Mr. Garg - the central figure of the enterprise - at the very least has constructive knowledge of deceptive acts and practices.

2. Blaine C. Christofferson

Mr. Christofferson is personally liable because he has authority over U.S. Protel and has knowledge of its deceptive acts and practices. Mr. Christofferson is an owner and Chief Executive of U.S. Protel.¹¹⁵ Along with Mr. Garg and Mr. Lee, Mr. Christofferson is copied on U.S. Protel memoranda concerning telemarketing strategy.¹¹⁶ U.S. Protel's general manager reports

¹¹³ **PX** 19, p. 359 [Daniels (FTC Investigator) Dec., ¶ 36].

¹¹⁴ **PX** 17, p. 301 [Maiterth (Former Employee) Dec., ¶ 67].

¹¹⁵ **PX** 19, p. 474 [Daniels (FTC Investigator) Dec., App. G]; **PX** 17, p. 289 [Maiterth (Former Employee) Dec., ¶ 14].

¹¹⁶ **PX** 17, p. 316 [Maiterth (Former Employee) Dec., App. A].

to Mr. Christofferson, and Mr. Christofferson is involved in the day-to-day operations of the Protel Companies.¹¹⁷ He regularly conducts business at U.S. Protel's telemarketing offices in New Richmond, Wisconsin - one of several corporate sales sites where telemarketers engage in deceptive and misleading sales pitches.¹¹⁸ Mr. Christofferson is, at a minimum, constructively aware of the company's pattern and practice of deception.

3. Scott D. Lee

Mr. Lee is personally liable because he controls Protel and U.S. Protel, and he knows about the corporations' deceptive acts and practices. He is President and Director of Protel.¹¹⁹ Mr. Lee is also an owner of U.S. Protel.¹²⁰ Along with Mr. Garg and Mr. Christofferson, Mr. Lee is copied on U.S. Protel memoranda concerning telemarketing strategy.¹²¹ Like Mr. Christofferson, Mr. Lee is involved in the day-to-day operations of the Protel Companies.¹²² He also regularly conducts business at U.S.

¹¹⁷ PX 17, p. 289 [Maiterth (Former Employee) Dec., ¶¶ 15-16].

¹¹⁸ PX 17, p. 289 [Maiterth (Former Employee) Dec., ¶ 15].

¹¹⁹ PX 19, pp. 484, 491 [Daniels (FTC Investigator) Dec., Apps. H, J].

¹²⁰ PX 17, p. 289 [Maiterth (Former Employee) Dec., ¶ 14].

¹²¹ PX 17, p. 316 [Maiterth (Former Employee) Dec., App. A].

¹²² PX 17, p. 289 [Maiterth (Former Employee) Dec., ¶¶ 15-16].

Protel's New Richmond office.¹²³ U.S. Protel's general manager reports to Mr. Lee.¹²⁴ Mr. Lee is, at a minimum, constructively aware of the Protel Companies' pattern and practice of deception.

**IV. THE ANCILLARY RELIEF REQUESTED BY THE COMMISSION
IS NECESSARY AND APPROPRIATE**

**A. An Asset Freeze is Necessary to Preserve the
Possibility of Redress Pending a Hearing on the Merits**

The Court's authority to enter orders to preserve the defendants' assets is ancillary to its equitable authority to order consumer redress. See Security Rare Coin, 931 F.2d at 1314-15. Freezing a defendant's assets is appropriate when the possibility of dissipation exists. See FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989). That possibility is always present when, as here, defendants' business is permeated by fraud. SEC v. Manor Nursing Ctrs., 458 F.2d 1082, 1106 (2d Cir. 1972).

The Court has the authority, moreover, to freeze both corporate and individual assets. H. N. Singer, 668 F.2d at 1113; see also World Travel Vacation Brokers, 861 F.2d at 1031. In the instant case, such action is necessary to eliminate the risk of dissipation and preserve assets for redress to consumers.¹²⁵

¹²³ Id.

¹²⁴ **PX** 17, p. 289 [Maiterth (Former Employee) Dec., ¶ 16].

¹²⁵ Although an asset freeze may interfere with the defendants' activities, it "is a necessary and . . . unavoidable consequence of the violation." National Soc'y of Professional Eng'rs v. U.S., 435 U.S. 679, 697 (1978).

B. An Equity Receiver Will Maintain the Status Quo and Preserve the Assets of the Corporate Defendants

The appointment of a temporary receiver over the corporate defendants, like an asset freeze, is appropriate and necessary. See FTC v. American Nat'l Cellular, 810 F.2d 1511, 1512-14 (9th Cir. 1987). Appointment of a temporary receiver will maintain the status quo, thereby preventing the destruction of documents and the secretion of assets while the case is pending. A temporary receiver is particularly appropriate when defendants' pervasive fraud presents the likelihood of continued misconduct. See SEC v. Bowler, 427 F.2d 190, 197-98 (4th Cir. 1970) (prima facie showing of fraud and mismanagement, absent insolvency, is sufficient basis for appointment of a receiver); SEC v. Capitol Counselors, Inc., 332 F. Supp. 291, 304 (S.D.N.Y. 1971).

Appointment of a temporary receiver is appropriate because defendants' business practices are fraudulent. These practices continue despite the fact that defendants have been sued by the Illinois Attorney General.¹²⁶ If defendants remain in control of their business, there is a substantial risk that they will destroy evidence and misappropriate the fruits of their fraud. A temporary receiver will eliminate those risks without disrupting any legitimate business activities. See SEC v. Keller Corp., 323

¹²⁶ PX 15, pp. 133-36 [Andrie (Former Employee) Dec., ¶¶ 17-25]; PX 21, p. 508 [Briggs (Consumer) Dec., ¶¶ 8, 9]; PX 21, p. 502 [Huttenlock (Consumer) Dec., ¶ 2].

F.2d 397, 403 (7th Cir. 1963). At the same time, a temporary receiver can help the Court determine the extent of defendants' fraud, trace the proceeds of the fraud, and prepare an accounting. The Commission believes that an accounting is essential to determine the whereabouts of the substantial sums of money defendants have fraudulently obtained from consumers. See World Wide Factors, 882 F.2d at 348; SEC v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986).

C. An Order Requiring Expedited Discovery and Immediate Access to Relevant Financial Information is Appropriate

The Commission seeks to engage in expedited discovery so that it can quickly and efficiently locate ill-gotten assets, identify possible additional defendants, find documents pertaining to defendants' businesses, and locate the individual defendants, should they attempt to evade service. Specifically, the Commission seeks permission to conduct depositions upon forty-eight hours' notice, and to issue requests (or subpoenas) for production of documents on five days' notice. Expedited discovery is particularly appropriate when a party seeks preliminary relief in a case involving the public interest. See Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); FSLIC v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987).¹²⁷

¹²⁷ Inasmuch as both the Commission and defendants will need to prepare for any preliminary injunction hearing, the Commission's Proposed TRO directs the temporary receiver to provide both the Commission and defendants with reasonable access to defendants'

This Court is authorized to depart from normal discovery procedures when circumstances warrant. FED.R.CIV.P. 26(d), 33(a) & 34(b). See also Federal Express Corp. v. Federal Expresso, Inc., No. 97-CV-1219, 1997 U.S. Dist. LEXIS 19144, *6 (N.D.N.Y. Nov. 24, 1997) (early discovery "'will be appropriate in some cases, such as those involving requests for a preliminary injunction.'" (citation omitted); Benham Jewelry v. Aron Basha Corp., No. 97 CV 3841, 1997 U.S. Dist. LEXIS 15957, at *58 (S.D.N.Y. July 18, 1997) (courts have broad powers to grant expedited discovery).

D. The Temporary Restraining Order Should be Issued Ex Parte and Without Notice

A temporary restraining order ("TRO") may be entered ex parte when it appears that "irreparable injury, loss, or damage will result" before the defendants are heard in opposition. FED.R.CIV.P. 65(b). That standard is satisfied when the evidence demonstrates that notice to the defendants would render the TRO fruitless. In re Vuitton et Fils, S.A., 606 F.2d 1, 5 (2d Cir. 1979); Cenergy Corp. v. Bryson Oil & Gas P.L.C., 657 F. Supp. 867, 870 (D. Nev. 1987). The fraudulent nature of defendants' scheme, coupled with the possibility that defendants may conceal assets or business records absent ex parte relief, justifies dispensing with notice.

premises.

The Commission's experience has been that defendants engaged in similar schemes may withdraw funds from bank accounts and flee or shred inculpatory documents if given notice.¹²⁸ As a result, courts repeatedly grant ex parte TROs in Commission actions seeking permanent injunctions under Section 13(b).¹²⁹ Defendants already have demonstrated their propensity to eliminate evidence. Two former employees report that defendants recently confiscated or ordered the destruction of several versions of scripts used to promote their services.¹³⁰

Without ex parte relief, defendants could easily dissipate or conceal assets and destroy documents that identify injured consumers. Should that occur, the Commission's case and the possibility of providing redress to injured consumers would be irreparably harmed. An ex parte TRO is in the interest of justice, as contemplated by FED.R.CIV.P. 65(b). It is indispensable to securing full and effective final relief.

¹²⁸ See Declaration and Certification of Evan Siegel Pursuant to Federal Rule of Civil Procedure 65(b) in Support of Ex Parte Motion for Temporary Restraining Order, filed along with this Memorandum.

¹²⁹ E.g., FTC v. Giving You Credit, No. 96 C 2088 (N.D. Ill. Mar. 4, 1997); FTC v. Brandzel, No. 96 C 1440 (N.D. Ill. March 13, 1996); FTC v. Intellicom Services, Inc., CV 97-4572 TJH (C.D. Cal. 1997); FTC v. Equifin Int'l, CV 97-4526 DT (C.D. Cal 1997); FTC v. American National Cellular, Civ. No. 85-7375 WJR (C.D. Cal. 1985), aff'd, 810 F.2d 1511 (9th Cir. 1987).

¹³⁰ **PX** 17, p. 122 [Maiterth (Former Employee) Dec., ¶ 312]; **PX** 15, pp. 131-32 [Andrie (Former Employee) Dec., ¶¶ 9, 12].

V. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court issue the proposed Ex Parte Temporary Restraining Order with Asset Freeze and Order to Show Cause.

Dated: _____ 1999

Respectfully submitted,

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